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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/027,269	12/21/2001	Steven Craig Gehling	17,117	3066

23556 7590 08/12/2003

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EXAMINER

RUHL, DENNIS WILLIAM

ART UNIT PAPER NUMBER

3761

DATE MAILED: 08/12/2003

12

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/027,269

Applicant(s)

GEHLING ET AL. *cm*

Examiner

Dennis Ruhl

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 May 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14, 17-42, 44-53, 55 and 56 is/are pending in the application.
- 4a) Of the above claim(s) 11-13, 17-32, 36, 43, 46, 49, 52 and 54 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 55, 56 is/are allowed.
- 6) ☒ Claim(s) 1-6, 8-10, 14-16, 33, 34, 38-42, 44, 45, 50, 51 and 53 is/are rejected.
- 7) ☒ Claim(s) 7, 35, 37, 47 and 48 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 8, 9.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

Applicant's response of 5/22/03 has been entered. The examiner will address applicant's remarks at the end of this office action.

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-6,8-10,14-16,33,34,39-42,44,45,50,51,53, are rejected under 35 U.S.C. 102(b) as being anticipated by Rubinstein (4286596).

With respect to claims 1-5,8,10,14,39,41,44,50,51,53, Rubinstein discloses an absorbent device that has a body 10, absorbent zone (upper part of 10 at or near 20a), application zone (area surrounding reservoir 30 and extending to 45b), and formulation 35. The application zone is adjacent the proximal end as claimed. The language "and adapted to be positioned entirely within the user" has been treated to the extent that the device of Rubinstein is fully capable of the claimed intended use. The manner in which the device is to be used does not define any further structure to the claimed invention so Rubinstein is an anticipatory reference. Recitations of intended use in article claims will be given minimal patentable weight.

With respect to claim 6, the non-absorbent material is 45b.

With respect to claims 9,40, the reservoir is in fluid communication with the surface.

With respect to claims 15,16,42,45, see column 4, lines 17-23 where the claimed limitation is disclosed.

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With respect to claims 33,34, these claims are reciting product by process limitations and only the end structure of the article will be given patentable weight. In this case the product by process claims do not define any further structure to the absorbent device because the limitation of "compressed" does not define anything about the end structure of the article. An article could be compressed to a given size or made to the given size and in both instances the end structure would be the same (the given size). The limitation concerning when the formulation is applied does not define anything to the end structure of the article. The prior art satisfies the claimed limitations because the end structure is found in Rubinstein.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claim 38 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rubinstein (4286596). Rubinstein discloses the invention substantially as claimed. Rubinstein does not disclose that the formulation includes a polymeric material (such as a viscosity agent, stabilizer, etc.). It is well known in the art that treatment formulations includes polymeric materials and that the type of formulation used is dependent on the condition being treated. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Rubinstein with a formulation that has a polymeric material as is well known in the art.

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5. Claims 7,35,37,47,48 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

6. Claims 55,56 are allowed.

7. Applicant's arguments filed 5/22/03 have been fully considered but they are not persuasive. In response to applicant's argument that Rubinstein does not disclose the claimed intended use recitation added to the claims, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In the instant case the claimed intended use defines nothing further to the claims in the way of structure and the device of Rubinstein is fully capable of the claimed intended use.

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

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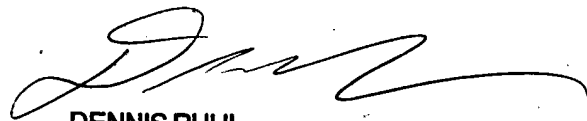
extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Ruhl whose telephone number is 703-308-2262. The examiner can normally be reached on Tuesday through Friday.

The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.

DR
August 10, 2003



DENNIS RUHL
PRIMARY EXAMINER